IOWA BOARD OF NURSING

In RE: Petition for Declaratory Order Filed By: J. R. "Lynn" Boes on behalf of her client, Carey Ryan, ARNP, CNM on May 23, 2001	))))))	Declaratory Order No. 104 ARNP/CNM Pronouncement of Fetal Death

A petition for a "declaratory ruling"[1] was filed with the Iowa Board of Nursing by J. R. "Lynn" Boes, on behalf of her client, Carey Ryan, A.R.N.P., C.N.M. on May 23, 2001.

On June 20, 2001, in accordance with Iowa Code 17A and Iowa Administrative Code 655-9.1 a Petition for Intervention was received from the Iowa Medical Society. The board granted the petition on June 25, 2001.

Iowa Code Chapter 17A sets out certain notice requirements which the agency must satisfy upon the receipt of a petition and provides authority for intervention by interested persons. Iowa Code §17A.9(5)(b) also provides that, within thirty (30) days after receipt of a petition for declaratory order, the agency may "set the matter for specified proceedings." In this case, the Board issued a scheduling order setting the matter for consideration on September 20, 2001 and setting out a procedural framework for review of the petition.

As required by the board's rules, the board gave notice to all persons not served by the Petitioner. The board identified an additional eighty-seven persons and mailed the scheduling order to those individuals. In addition to the Petition for Intervention, the board received written comments from six entities

and heard oral comments from six persons during the public hearing on September 20, 2001.

Declaratory Orders

Iowa Code §17A.9 provides the Board with statutory authority to issue declaratory orders. That section provides that "any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2. Id. Iowa Code §17A.9(2) provides that the agency "shall adopt rules that provide for the form, contents and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions." The Board's rules, which reference the Uniform Rules on Agency Procedure, may be found at 655 IAC Chapter 9.

The purpose of the declaratory order provision of the statute is to establish a procedure, which "permits persons to seek formal opinions on the effect of future transactions and arrange their affairs accordingly." Women Aware v. Reagan, 331 N.W.2d 88, 92 (Iowa 1983) citing A. Bonfield, The Administrative Procedures Act: Background, Construction, Applicability, Public Access To Agency Law, The Rulemaking Process, 60 Iowa L.Rev. 731, 807 (1975). Iowa Code §17A.9 "contemplates rulings based on purely hypothetical facts, and renders them subject to review." Women

Aware v. Reagan, 331 N.W.2d at 88; City of Des Moines v. Public Employment Relations Board, 275 N.W.2d 753, 758 (Iowa 1979).

An order issued upon the filing of a petition for a declaratory order "has the same status and binding effect as any final order issued in a contested case proceeding." Office of the Consumer Advocate v. Iowa State Commerce Commission, 395 N.W.2d 1, 6 (Iowa 1986); Iowa Code §17A.9(7). If a declaratory order is issued the order "must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion." Iowa Code §17A.9 (7). The agency action taken on the petition is subject to judicial review pursuant to Iowa Code §17A.19. Public Employment Relations Board v. Stohr, 279 N.W.2d 286, 289 (Iowa 1979).

Question one:

The petitioner presents three questions. The first question posed is as follows:

> **1. May an advanced registered nurse practitioner, certified nurse midwife, who in the course of conducting an Apgar on a neonate, and who determines that the Apgar is 0/0, and who initiates resuscitation, which proves to be unsuccessful, make a determination of fetal death without consulting with a physician.[sic] (i.e. [sic] Would an ARNP, CNM be practicing within their [sic] scope of practice, as authorized by the Board of [n]ursing, if they determine that an infant with APGARs [sic] of 0/0, is dead, without consulting with a physician to make such a determination.)[sic].**

In posing this question, the Petitioner appears to rely upon House File 354, an act passed by the 2001 General Assembly, which amended Iowa Code §702.8. No other legal authority is cited in the petition in support of the Petitioner's position that a "yes"

response is required. In addition, the petition lacks citation to acceptable professional standards, journals or treatise in support of an affirmative response.

The Petitioner's reliance upon House File 354 is misplaced, as the amendment does not support the conclusion urged by the Petitioner.

Iowa Code §702.8, as amended, provides in pertinent part as follows:

> "Death" means the condition determined by the following standard: A person will be considered dead if in the announced opinion of a physician licensed pursuant to chapter 148, 150 or 150A, a physician assistant licensed pursuant to chapter 148C or a registered nurse or licensed practical nurse pursuant to chapter 152, based on ordinary standards of medical practice, that person has experienced an irreversible cessation of spontaneous respiratory and circulatory function.

House File 354 also amended Iowa Code Chapter 152 by adding expressed parameters governing the nurse's determination of death. These amendments, found at Iowa Code §§152.1(4)(c) and 152.1(6)(dd), provide that a registered nurse or licensed practical nurse may:

> Make the pronouncement of death for a patient whose death is anticipated if the death occurs in a licensed hospital, a licensed health care facility, a Medicare-certified home health agency, or a Medicare-certified hospice program or facility, with notice of the death to a physician and in accordance with any directions of a physician.

The above-cited amendments to Iowa Code Chapter 152 makes it clear that the nurse's determination of death is conditioned upon the following factors:

- the death must be anticipated;
- the death occurs in one of the listed settings;
- the nurse's determination is executed with notice to the physician and in accordance with any physician directions.

Unless all of these factors are satisfied, the nurse lacks statutory authority to make a determination of death. By use of clear and unambiguous language, the legislature has expressly limited the declarations of death, which may be performed by Iowa nurses, and no exception was enacted for ARNPs. Moreover, it is a fundamental tenet of statutory construction that the expression of one thing is considered the exclusion of another. Bennett v. Iowa Department of Natural Resources, 573 N.W.2d 25, 27 (Iowa 1997); citing Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995). Thus, the amendments to Iowa Code Chapter 152 enacted through House File 354 should not be read as permitting determinations of death under any circumstances which stray from the parameters set by the legislature.

The first question of the Petition also appears to conflict with other provisions of Iowa law applicable to determinations of fetal death. Iowa Code §144.1(7) contains a specific definition of fetal death, which is not affected by the amendments enacted in House File 354. In addition, Iowa Code §§ 144.29 and 144.31 set forth detailed requirements for the completion and filing of a fetal death certificate. These sections also remain unaffected by House File 354 and do not contemplate a determination of fetal death by a nurse. Similar concerns exist regarding Iowa Code §331.802, which gives the medical examiner investigative juris-

diction over deaths affecting the public interest. These sections of Iowa law do not support the conclusion that an ARNP can make a determination of fetal death.

The Petitioner's first question regarding a determination of fetal death also necessitates review of other related provisions of Iowa law regarding the disposition and transport of dead bodies. The Iowa Department of Public Health exercises sole jurisdiction over the disposal and transportation of dead bodies. Iowa Code §135.11(9). The disposal and transportation of a dead body must occur in conformance with all applicable provisions of Iowa law. See Iowa Code Chapters 144, 156 and 641 IAC 101.4, 101.5, 101.6 and 645 IAC 100.3 and 100.4. These provisions of Iowa law and the execution and filing of a fetal death certificate do not contemplate a determination of fetal death by an ARNP. Therefore, these provisions appear to conflict with Petitioner's views regarding such determinations.

The existing provisions of Iowa law as well as recognized standards of practice dictate a negative response to the Petitioner's first question. A nurse's determination of death may only occur where the death is anticipated. 655 IAC Chapter 7 authorizes an ARNP-CNM to provide care to the normal newborn. Death during a home birth would not normally be an anticipated outcome. If death does occur, that outcome suggests that the ARNP-CNM was engaged in a high-risk delivery.

The standards for initiating resuscitation or discontinuing resuscitative efforts from the ACNM and the American Academy of Pediatrics are clear. The ACNM Core Competencies for Basic Mid-

wifery Practice - The Childbearing Family state that a CNM "Applies knowledge of midwifery practice that includes, but is not limited to...methods to facilitate adaptation to extrauterine life: (i) stabilization at birth, (ii) resuscitation, and (iii) emergency management."[2]

The established method for resuscitation is the Neonatal Resuscitation Program (NRP) developed by the American Academy of Pediatrics and the American Heart Association. In the inpatient setting, it is common to require current certification. No less a standard should be expected by a home birth provider. The NRP defines the special circumstances under which noninitiation of resuscitation is reasonable. These include newborns with confirmed gestation of less than 23 weeks or birth weight less than 400 grams, anencephaly, and babies with confirmed trisomy 13 or 18. All other infants should be given a full resuscitative effort.[3]

The NRP text also addresses discontinuation of resuscitative efforts as well as techniques for babies born outside the hospital. While the text states that efforts should continue for 15 minutes after absent heart rate, the standard for the out-of-hospital provider would include activation of the emergency medical service (EMS). According to Varney, "Any midwife attending births has a moral and ethical obligation to provide an environment in which resuscitation of the newborn can be effectively accomplished. To achieve this goal, the midwife needs (1) training in resuscitation techniques; (2) available and functional resuscitation equipment; (3) adequate support personnel;

(4) and a clear-cut system for neonatal transport and/or referral to pediatric providers. In a free-standing birth center or home birth practice the midwife has an obligation to establish a clear-cut mechanism for transport and/or referral of the compromised newborns. During the interval before the transport team arrives, the nurse-midwife must continue to care for the newborn."[4]

The Petitioner uses Apgar scores as a basis for noninitiation or discontinuation of resuscitation. "The Apgar scores quantify and summarize the newly born infant to the extrauterine environment and to resuscitation. The Apgar scores should not dictate appropriate resuscitative actions, nor should interventions for depressed infants be delayed until the 1-minute assessment."[5]

Conclusion:

Based on the provisions of law cited above and consideration of other relevant issues, the board's response to question one is "no," the ARNP, CNM may not make a determination of fetal death.

Question two:

The second question posed is as follows:

> **2. May the CNM use his/her professional judgment in determining whether to initiate CPR on a neonate, or must the CNM always institute resuscitation measures on an infant who's [sic] Apgar scores are 0/0 at one minute and five minutes respectively?" Petition ¶9(b).**

The petition requests an answer in the affirmative to this question but fails to state any legal authority for that

position.

Iowa Code §152.1(6)(a) defines the practice of a registered nurse as including the provision of care, treatment, and diagnosis, which "is supportive to or restorative of life and well-being." The failure to initiate resuscitation is in direct conflict with this provision of the Iowa Code. The failure to initiate resuscitation would also appear to be in conflict with the minimum standards of practice found in the Board's rules at 655 IAC 6.2.

The Petitioner's suggestion that the ARNP may use Apgar scores as a means of determining whether to initiate resuscitation also appears to fall outside of acceptable professional standards. Any suggestion that the use of the Apgar score as the sole means of determining death or whether to initiate CRP is not in keeping with professional standards.[6] Core competency standards for an ARNP-CNM as set by the ACNM, require that the practitioner apply methods to facilitate adaptation to extrauterine life, including stabilization at birth, resuscitation and emergency management.[7] Professional standards support the conclusion that a decision to initiate resuscitation should never be based upon Apgar scores.[8] The hypothetical question posed fails to cite any acceptable medical or nursing authorities establishing that Apgar scores is an acceptable means of determining whether to initiate resuscitation. Moreover, the petition is lacking in citation to any authorities establishing the reliability of the Apgar score in a pronouncement of death.

Conclusion:

The board's response to the portion of question 2 which asks "May the CNM use his/her professional judgment in determining whether to initiate CPR on a neonate?" is no. The board's response to the portion of question 2 which asks "must the CNM always institute resuscitation measures on an infant who's [sic] Apgar scores are 0/0 at one minute and five minutes respectively?" is yes. Acceptable professional standards established by NRP as published by the American Heart Association and American Academy of Pediatrics require full resuscitation of all infants in the absence of certain confirmed conditions: confirmed gestation of less than 23 weeks or birth weight less than 400 grams, anencephaly, and infants with confirmed trisomy 13 or 18.[9] According to Varney, "In a free-standing birth center or home birth practice, the midwife has an obligation to establish a clear-cut mechanism for transport and /or referral of compromised newborns."[10] ACNM Standard V requires the CNM to demonstrate appropriate techniques for emergency management including arrangements for emergency transportation.[11]

ACNM Standard VI requires the CNM to demonstrate a safe mechanism for obtaining medical consultation, collaboration, and referral.[12] The Petitioner appears to suggest that the resuscitation decision in the event of a compromized fetus or newborn may be made in the complete absence of consultation, collaboration or referral but fails to cite legal authority for that position.

Question three:

The last question of the petition presents as follows:

3. If the answers to the foregoing questions are no, how is the Advanced Registered Nurse Practitioner practicing independently under Iowa law, within the scope of their practice? Petition ¶9(c).

Conclusion:

This question lacks sufficient hypothetical facts on which to provide a substantive response and is simply rhetorical.

The board refuses to issue a declaratory order on question 3. See IAC 9.9(1)(2)and (6) Refusal to issue order.

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M. Ann Aulwes-Allison, R.N., M.A., Ed.S. Date
Chairperson
Iowa Board of Nursing

_____ _____

Lorinda K. Inman, R.N., M.S.N. Date
Executive Director
Iowa Board of Nursing

Persons aggrieved by this action by the Board may seek judicial review in accordance with the provisions of the Iowa Code, Chapter 17 A.

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[1] The petition filed by Ms. Ryan is captioned as a "Petition for Declaratory Ruling." Iowa Code section 17A.9 authorizes the filing and consideration of petitions for declaratory orders.

[2] American College of Nurse-Midwives *Core Competencies for Basic Midwifery Practice* May 1997.

[3] International Guidelines for Neonatal Resuscitation: An Excerpt From the Guidelines 2000 for Cardiopulmonary Resuscitation and Emergency Caardiovascular Care: International Consensus On Science, PEDIATRICS Vol. 106 No.3, September 2000, pp 1-16.

[4] Helen Varney, Varney's Midwifery 3rd ed. Jones & Bartlett Sudbury, MA, 1997.

[5] International Guidelines.

[6] John Kattwinkel Textbook of Neonatal Resuscitation, 4th Ed. Copyright 2000 by the American Academy of Pediatrics and the American Heart Association

[7] American Academy of Nurse Practitioners-Standards for the Practice of Nurse-Midwifery 1003.

[8] Kattwinkel.

[9] International Guidelines.

[10] Varney.

[11] ACNM Standards.

[12] ACNM Standards.